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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of CAROL D. and
COLUMBUS ROY ROBISON.

CAROL D. ROBISON,

Respondent,

v.

COLUMBUS ROY ROBISON,

Appellant.

F055775

(Super. Ct. No. S-1501-FL-595714)

OPINION

APPEAL from a judgment of the Kern County Superior Court. H. A. Staley,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)

Tritt and Tritt and James F. Tritt for Appellant.

Law Offices of Edward J. Quirk, Jr., and Edward J. Quirk, Jr., for Respondent.

Appellant, Columbus Roy Robison (Roy), and respondent Carol D. Robison (Carol),¹ dissolved their marriage after more than 42 years. Roy contends the trial court erred in finding that certain assets were community property. According to Roy, his social security disability benefits, income from a separate property rental house, savings bonds purchased through his employment, and various guns that were gifted to him should have been credited to him as separate property. Roy further argues that the trial court abused its discretion in awarding Carol spousal support.

As discussed below, the trial court incorrectly found that Roy's social security disability benefits had lost their separate property status. However, as to the remaining issues, Roy has not met his burden of establishing error. Roy's separate property rental income was commingled with community property and Roy did not meet his burden of adequately tracing such income. In the trial court, Roy characterized the savings bonds as community property and therefore cannot claim them as separate property on appeal. Whether the guns were a gift to Roy alone is a question of fact and substantial evidence supports the trial court's finding that they were not. Finally, Roy has not demonstrated that the trial court abused its discretion in making the spousal support award. Accordingly, the judgment will be reversed in part but otherwise affirmed.

BACKGROUND

During the parties' marriage, they acquired numerous assets, including 13 residences, over \$300,000 in cash, United States savings bonds, and a large gun collection. Roy was employed by Chevron Texaco and participated in a retirement plan. However, Roy was injured in 1999. Thereafter, Roy received workers'

¹ As is customary in family law cases, the parties will be referred to by their first names for purposes of clarity. No disrespect is intended.

compensation, pension payments and, beginning in 2002, social security disability benefits. In general, the parties lived on the income they received from their rental properties.

A number of the parties' assets were in Roy's name alone. A savings account in Roy's name at the Chevron Valley Credit Union held community funds from Roy's paychecks and other sources including income from the various rental properties. In 2002, Roy transferred money from this account into an account he opened at Washington Mutual. Roy made transfers in and out of this account. The deposits included Roy's pay checks, pension checks, workers' compensation benefits, and social security disability payments. Carol had no access to the Washington Mutual account. Roy also purchased United States savings bonds with a face value of approximately \$94,000 in his name alone.

The parties separated more than once before their final separation. When the parties separated in 2003, Roy withdrew approximately \$250,000 from the Washington Mutual account and then returned the funds when the parties reconciled one month later.

The parties separated again in April 2005, reconciled in June 2005, and then separated finally on September 2, 2005. Beginning in March 2005, Roy began making withdrawals from the Washington Mutual account, including a \$290,000 withdrawal on March 25, for a total of approximately \$311,000. Roy transferred this money to various accounts he opened in his name alone and eventually converted it to cash in late summer 2005. Roy also liquidated a 401k plan account, two IRAs, and various savings bonds. Roy testified that by cashing out all of these accounts, he received a total of approximately \$379,000.

Roy testified that in late summer 2005 he had \$350,000 in cash in \$100 bills stored in his truck. When asked about the approximately \$29,000 balance, Roy stated

that he spent it on Carol after they separated in April “trying to show her a good time and get back with her.” Roy testified that on November 3, 2005, he placed this \$350,000 in a gun vault located in the house on Buena Vista where the parties had been living before their separation.

Carol testified that she lived in the Buena Vista house until early December 2005. When Carol left the Buena Vista house, she removed certain furniture and personal items with the assistance of the parties’ son, Roy, Jr. Roy, Jr., opened the gun vault and Carol removed 20 rifles. Both Carol and Roy, Jr., testified that there was no cash in the vault.

Roy testified that he discovered the cash in the gun vault was missing on December 11, 2005. He accused Carol of taking the money. According to Roy, when he placed the money in the gun vault at the Buena Vista house in November, he was the one living there, not Carol.

At trial, of the approximately \$379,000 Roy received from cashing out assets, Roy claimed approximately \$190,000 of it was his separate property. This amount included workers’ compensation payments, social security disability in the amount of \$78,752.79, and a Chevron Valley Credit Union account, “CASHED OUT 05/05” in the amount of \$9,794.66. According to Roy, this Chevron Valley Credit Union account held rental income from a separate property residence he inherited from his mother. Roy characterized the proceeds from the savings bonds as community property.

Roy also claimed that certain guns in the parties’ possession were given to him alone by Carol’s sister-in-law, Kathy Rowden, and therefore were his separate property. These guns had belonged to Carol’s deceased brother. Kathy Rowden signed a declaration stating that she had “gifted” the guns to Roy. However, her trial testimony was ambiguous.

The trial court ruled that Roy violated the fiduciary duty he owed Carol in withdrawing the \$350,000 from the Washington Mutual and other accounts and charged Roy with the loss of those funds. The court found that Roy obtained the money and Carol never received any. The court noted that “[t]he most incredulous part of [Roy’s] evidence was his own testimony that he drove his truck with roughly \$350,000 in cash in it for an extensive period of time.” The court concluded that Roy had: violated Family Code² section 721, subdivision (b); committed fraud; and intentionally testified falsely as to his actions surrounding the acquisition and subsequent disposition of the funds.

In dividing the remaining assets, the court awarded all of the rental properties to Carol. The court also did not agree with Roy’s claim that certain of the guns were his separate property but, rather, charged him for all the guns in his possession. Carol was awarded spousal support of \$750 per month and Roy was ordered to pay Carol’s attorney fees in the amount of \$30,000.

DISCUSSION

1. The social security disability benefits maintained their status as Roy’s separate property.

As noted above, in 2002 Roy began receiving social security disability benefits. By the time the parties separated, Roy had received approximately \$78,000. These social security payments were deposited directly into the Washington Mutual account. Before the social security payments began, Roy deposited approximately \$96,000 in workers’ compensation benefits into the Washington Mutual account. This account also held Roy’s pension payments and other community savings.

² All further statutory references are to the Family Code.

Due to federal preemption, social security benefits received by a spouse are not an asset of the community and thus are not subject to division by state courts at the time of dissolution. Rather, those benefits must be treated as the recipient's separate property. (*In re Marriage of Cohen* (1980) 105 Cal.App.3d 836, 843.) Thus, the social security payments received by Roy were his separate property.

However, Roy commingled these payments with other community assets in the Washington Mutual account. Nevertheless, commingling separate and community property does not alter the status of the separate property interest so long as it can be traced to its separate property source. (*In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1057.) Moreover, any family living expenses paid from such a commingled fund are presumed to be paid from the community rather than the separate funds. (*Beam v. Bank of America* (1971) 6 Cal.3d 12, 20.)

The spouse claiming a separate property interest bears the burden of tracing the asset to a separate property source. Whether the spouse met that burden is a question of fact and the trial court's holding must be upheld if supported by substantial evidence. (*In re Marriage of Cochran, supra*, 87 Cal.App.4th at pp. 1057-1058.)

Here, Roy claimed a separate property interest in the social security disability below. However, without explanation, the trial court treated the entire Washington Mutual account as community property. By implication, the trial court must have concluded that Roy had not met his burden of proving the separate character of these disability payments.

As noted by Carol, the records submitted for the Washington Mutual account are incomplete. Nevertheless, from those records it is apparent that, except for Roy's large withdrawal in 2003 that he returned one month later upon the parties' reconciliation, and Roy's withdrawals totaling approximately \$311,000 in 2005 that he ultimately converted to cash, the social security disability remained intact. Any

withdrawals that were used for community expenses are presumed to be from community assets. With the exception of the large withdrawals noted above, the balance in the account did not fall below the amount of the social security payments. Thus, the portion of the cash from the Washington Mutual account attributable to the social security disability Roy received between 2002 and 2005 retained its separate property character. The trial court's implied finding to the contrary is not supported by the record. Accordingly, the order charging Roy with the entire Washington Mutual account balance must be revised to subtract Roy's social security disability from that balance.

2. Roy did not meet his burden of tracing the allegedly separate property rental income.

Roy claims that approximately \$9,800 in income from a separate property rental house was erroneously included in the cash that was charged to him as community property. This money was held in a Chevron Valley Credit Union account that was "cashed out" in May 2005. However, aside from Roy's testimony regarding this account, there is no evidence of where these funds came from.

All issues of credibility are for the trier of fact. (*In re Marriage of Cochran, supra*, 87 Cal.App.4th at p. 1056.) Here, as discussed above, the trial court described Roy's testimony as "false[]" and "incredulous." Considering the absence of any other evidence of the source of these funds, the trial court did not abuse its discretion in finding that Roy did not rebut the presumption that these funds acquired during the marriage were community property. (Cf. *In re Marriage of Higinbotham* (1988) 203 Cal.App.3d 322, 330.)

3. *The savings bonds were properly charged to Roy as community property.*

Roy acknowledges that he cashed out United States savings bonds with a face value of \$40,000. Carol testified that shortly before the parties' separation, they had savings bonds with a face value of \$80,000 in their possession. These bonds were purchased during the marriage but were in Roy's name alone as owner.

The trial court charged Roy with \$80,000 for the savings bonds. Roy contends the trial court erred because, under federal law, those bonds are his separate property. Roy further argues that, even assuming the bonds are community property, the evidence does not support the \$80,000 valuation.

Roy argues, under the authority of *Free v. Bland* (1962) 369 U.S. 663 and *Yiatchos v. Yiatchos* (1964) 376 U.S. 306, that the United States savings bonds purchased with community funds were his separate property solely by virtue of their being in his name. However, the fact that the bonds were in his name does not in and of itself transmute their community nature into his separate property. Such a transmutation does not occur without the other spouse's consent or ratification. (*Yiatchos v. Yiatchos, supra*, 376 U.S. at p. 312; *Estate of Bray* (1964) 230 Cal.App.2d 136, 143.)

Moreover, in the trial court, Roy asserted that these bonds were community property. In general, the theory upon which a case is tried must be adhered to. A party may not change his or her position and adopt a new and different theory on appeal. (*In re Marriage of Walker* (2006) 138 Cal.App.4th 1408, 1418.) To permit a party to do so is both unfair to the trial court and unjust to the opposing litigant. (*Ibid.*) Thus, this court will not consider Roy's claim that the savings bonds were his separate property.

Roy notes that courts will permit a change in theory when the issue involves purely a question of law presented on the facts appearing in the record. (*Ward v.*

Taggart (1959) 51 Cal.2d 736, 742; *Palmer v. Shawback* (1993) 17 Cal.App.4th 296, 300.) Here, however, whether Carol either consented to or ratified the transmutation of community property to Roy's separate property is a question of fact that was not before the trial court. Thus, Carol had no opportunity to challenge Roy's claim below. Accordingly, Roy's separate property theory does not fall within the "question of law" exception.

Roy further argues that the savings bonds should be valued at \$32,000 not \$80,000. Roy bases this argument on his testimony that he only had bonds with a face value of \$40,000 that he cashed out for approximately \$32,000. However, Carol testified that shortly before their separation, the face value of the savings bonds in the parties' possession was \$80,000.

Roy, as the appellant, bears the burden of establishing error. (*In re Marriage of Cochran, supra*, 87 Cal.App.4th at p. 1056.) Moreover, all issues of credibility are for the trial court, and all conflicts in the evidence must be resolved in support of the judgment. (*Ibid.*)

Here, the trial court made a factual finding based on conflicting testimony. This conflict must be resolved in support of the judgment. Thus, no grounds exist for reversing the trial court's ruling. Furthermore, the trial court did not abuse its discretion in charging Roy for the face value of the bonds. Carol should not be penalized for Roy's imprudent decision to cash out the bonds before maturity.

4. Roy has not established the trial court erred in concluding that the guns acquired from Kathy Rowden were community property.

Carol's sister-in-law, Kathy Rowden, was in possession of certain guns that had belonged to Carol's deceased brother. During the marriage, when both Roy and Carol were present, Roy picked out which of these guns he wanted.

At trial, Roy claimed these guns were his separate property. In support of his position, Roy presented a statement signed by Rowden wherein she declared that she “gifted” the listed guns to Roy. However, Rowden’s trial testimony was unclear. When asked “So when you gave these guns to the Robisons, you meant as a gift to him but not to them? [¶] Is that what you are saying today?” Rowden replied “Well, I didn’t know -- yeah, that’s what I am saying.” Shortly thereafter, the colloquy was as follows:

“Q. ... [¶] You never said that these are just to him? [¶] It was a gift to them?

“A. Well, I didn’t specify a gift to both of them.

“Q. Correct. You didn’t specify it was a gift to him or to both of them. [¶] You just gave them to him; correct?

“A. Yeah.”

Based on this evidence, the court concluded that these guns were a community asset.

In general, property acquired during marriage by either spouse, other than by gift or inheritance, is community property. (*In re Marriage of Weaver* (2005) 127 Cal.App.4th 858, 864.) This is a rebuttable presumption affecting the burden of proof and thus can be overcome by the party contesting community property status. (*Ibid.*)

Here, Rowden was ambivalent on the issue of whether she made a gift to one or to both spouses. In finding the guns were community property, the trial court impliedly concluded that Roy did not meet his burden of overcoming the community property presumption. Rowden’s testimony was ambiguous and it was for the trial court to evaluate her credibility. Accordingly, there is no basis for this court to reverse this ruling. Roy has not met his burden of establishing error.

5. Roy has not established that the trial court abused its discretion in awarding spousal support.

The trial court awarded Carol \$750 per month in spousal support. In making this ruling, the court considered all the circumstances enumerated in section 4320. In support of the award, the court found that Roy had obtained considerably more liquid assets than Carol through the accounts Roy held solely in his name and fraudulently kept from Carol and that Carol had been greatly prejudiced by Roy's fraudulent conduct.

A spousal support award is governed by statute. In making the order, the trial court must consider and weigh each of the circumstances enumerated in section 4320 to the extent that it is relevant. (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 207.) The court has broad discretion in balancing these statutory factors and determining the appropriate weight to accord to each but it may not be arbitrary. (*Ibid.*) Rather, in exercising its discretion, the court must follow established legal principles and base its findings on substantial evidence. (*In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, 1235.) However, if the trial court conforms to these requirements, the ultimate decision as to amount and duration of spousal support will not be reversed on appeal absent an abuse of discretion, i.e., unless the court's order exceeds the bounds of reason, all circumstances before it being considered. (*In re Marriage of Ackerman, supra*, 146 Cal.App.4th at p. 207; *In re Marriage of Laube* (1988) 204 Cal.App.3d 1222, 1225.) Thus, an appellate court must act with cautious judicial restraint, even though the particular award might appear on appeal to be modest or generous. (*In re Marriage of Aufmuth* (1979) 89 Cal.App.3d 446, 458, disapproved on other grounds in *In re Marriage of Lucas* (1980) 27 Cal.3d 808, 815.)

Roy acknowledges that the trial court went through all the statutory factors. Roy argues the court either did not apply or misapplied those factors. According to Roy, the trial court erred in that it “double counted” the assets that were the subject of Roy’s breach of fiduciary duty, did not allow for the income from the rental properties awarded to Carol, and did not consider Carol’s entitlement to social security benefits.

In analyzing the factor of the ability of the supporting party to pay support (§ 4320, subd. (c)), the court found that Roy had considerable assets he obtained from the accounts he fraudulently kept from Carol. Regarding the needs of each party based on the standard of living established during the marriage (§ 4320, subd. (d)) and the assets of each party (§ 4320, subd. (e)), the court found that Roy had considerably more liquid assets than Carol. Roy contends that, because these liquid assets, i.e., the Washington Mutual account and other funds, were charged to him without offset as punishment for his breach of fiduciary duty, using these assets as a factor requiring him to pay spousal support is a double use of the same asset. However, this is not the case. Regardless of whether the liquid assets were awarded with or without a corresponding offset, Roy ended up with \$350,000 in cash. Under these circumstances, finding that Roy had sufficient liquid assets to pay Carol \$750 per month did not exceed the bounds of reason.

Roy’s remaining objections pertain to the court’s consideration of Carol’s assets and obligations. (§ 4320, subd. (e).) The trial court found that Carol should be able to produce income from the rental properties she was awarded. Roy asserts the court did not allow for the rental income and contends that the parties had been receiving \$5,000 in income per month. However, there is no factual basis for Roy’s claim. Rather, the record reveals that the average of the gross rents collected between December 2006 and August 2007 was \$3,600 per month with a net income average of approximately

\$2,100 per month. Under these circumstances, awarding Carol \$750 in spousal support was not an abuse of discretion.

Roy further argues the trial court erred in not considering Carol's entitlement to social security. However, aside from asking Carol if she knew if she was eligible for social security, Roy did not present any evidence on this issue. Thus, the trial court had no basis for including potential social security in its analysis.

In sum, Roy has not met his burden of establishing that the trial court abused its discretion in awarding Carol spousal support.

DISPOSITION

The characterization of appellant's social security disability benefits as community property is reversed. In all other respects, the judgment is affirmed. The case is remanded for further proceedings in accordance with this opinion. The parties shall bear their own costs on appeal.

Levy, J.

WE CONCUR:

Vartabedian, Acting P.J.

Kane, J.